

ATTACHMENT 46

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 SAN FRANCISCO DIVISION

5 - - - - -x
6 SURGICAL INSTRUMENT SERVICE COMPANY, INC.,
7 Plaintiff,
8 -against-
9 INTUITIVE SURGICAL, INC.,
10 Defendant.

11 - - - - -x
12 Virtual Zoom Deposition
13 March 8, 2023
14 9:00 a.m. CST

15
16 VIRTUAL VIDEO DEPOSITION of RICHARD BERO,
17 in the above-entitled action, held at the
18 above time and place, taken before Jeremy
19 Richman, a Shorthand Reporter and Notary
20 Public of the State of New York, pursuant to
21 the Federal Rules of Civil Procedure, and
22 stipulations between Counsel.

23
24 * * *
25

1 R. BERO

2 considered in your expert reports in 09:15:39

3 this case? 09:15:41

4 A. No. 09:15:41

5 Q. So you mentioned in your 09:15:43

6 reports that you had conversations with 09:15:50

7 various people in connection with your 09:15:52

8 drafting of the expert reports in this 09:15:55

9 case. I would like to ask you a few 09:15:57

10 questions about those individuals, 09:16:01

11 okay? 09:16:03

12 A. Okay. 09:16:03

13 Q. So let's start with the 09:16:03

14 people, I think I have a complete list. 09:16:06

15 We'll make sure I have a complete list. 09:16:08

16 I think you spoke with Mr. Keith 09:16:11

17 Johnson in connection with your expert 09:16:13

18 reports in this case; is that right? 09:16:15

19 A. I did speak with Mr. Johnson, 09:16:17

20 correct. 09:16:20

21 Q. And who is Mr. Johnson? 09:16:20

22 A. Mr. Johnson is an employee at 09:16:22

23 SIS. 09:16:27

24 Q. And I believe he's the -- his 09:16:28

25 title is executive vice president, 09:16:31

1 R. BERO

2 sales and clinical programs, does that 09:16:33

3 sound right? 09:16:36

4 A. If you give me a moment to 09:16:38

5 grab my report, I believe I identified 09:16:40

6 his actual title. 09:16:44

7 Q. And I believe it's on page 3 09:16:49

8 of your report, and we will introduce 09:16:51

9 your reports as well, but just for your 09:16:53

10 reference, I think it's on page 3. 09:16:55

11 A. Okay. So you're referring to 09:16:57

12 my, just to be clear, December 2, 2022, 09:17:00

13 report? 09:17:06

14 Q. Correct. 09:17:09

15 A. Yes. Executive vice 09:17:13

16 president, sales and clinical programs, 09:17:15

17 correct. 09:17:17

18 Q. How many times did you speak 09:17:17

19 with Mr. Johnson, if you can recall, in 09:17:20

20 connection with preparing your expert 09:17:23

21 report in this case? 09:17:25

22 A. I don't remember. A few 09:17:25

23 times. I don't remember if that was 09:17:33

24 two or five, but it was more than once. 09:17:36

25 Q. When you spoke with 09:17:42

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1 R. BERO

2 Mr. Johnson, other than attorneys, was 09:17:43
3 there anyone else present during the 09:17:45
4 conversation? 09:17:47

5 A. When you say "present," just 09:17:50
6 to be clear, I believe these were Teams 09:17:59
7 calls or, you know, Zoom or whatever. 09:18:09
8 Or phone conferences. And on those 09:18:17
9 calls, other than attorneys, an 09:18:23
10 attorney and Mr. Johnson, I don't 09:18:30
11 believe anyone else would have been on, 09:18:37
12 although there may have been, 09:18:39
13 Mr. Posdal may have been on one call, 09:18:48
14 or perhaps more than one, but I don't 09:18:52
15 remember exactly. 09:18:55

16 Q. Who is Mr. Posdal? 09:18:55

17 A. He is, as you can see here on 09:19:00
18 page 3 of my December 2, 2022 report, 09:19:03
19 the president and CEO of SIS. 09:19:10

20 Q. So focusing on your 09:19:12
21 conversations with Mr. Johnson, did you 09:19:15
22 take notes during those calls? 09:19:17

23 A. I don't know that I took 09:19:20
24 notes, per se. Typically what we do is 09:19:26
25 we have somebody on our team take 09:19:32

1 R. BERO

2 drafts in our draft report, whatever 09:19:37
3 report we happen to be working on on 09:19:39
4 that case, so perhaps I did, or perhaps 09:19:42
5 somebody at my firm did. 09:19:44

6 Q. Do you know, do you recall 09:19:46
7 that Mr. Johnson took any notes while 09:19:47
8 you were talking? 09:19:49

9 A. I have no idea. 09:19:49

10 Q. Did you record the 09:19:51
11 conversation -- 09:19:55

12 A. Well, let me say I doubt it, 09:19:55
13 because my recollection is he may have 09:20:02
14 been in his car, but I don't know for 09:20:08
15 certain one way or the other. 09:20:15

16 Q. Understood. Did you record 09:20:17
17 the conversation with Mr. Johnson? 09:20:19

18 A. No. 09:20:22

19 Q. And in terms of the process 09:20:23
20 of when you have these interviews, I 09:20:28
21 think you indicated that the notes 09:20:31
22 would go into the draft report that you 09:20:32
23 were working on; is that right? 09:20:34

24 A. Typically, that's the way we 09:20:36
25 would do it. Sometimes we take notes 09:20:37

1 R. BERO

2 separately, but typically, we're taking 09:20:41
3 them in the draft report. 09:20:46

4 Q. And do you recall in this 09:20:46
5 case necessarily if the notes were 09:20:48
6 included in the draft report, or if 09:20:50
7 they were included in a separate 09:20:51
8 document? 09:20:53

9 A. I don't believe we took any 09:20:53
10 notes separately in this case, not that 09:20:58
11 I can recollect certainly. 09:21:02

12 Q. You mentioned Mr. Posdal. Do 09:21:04
13 you recall how many times you spoke 09:21:15
14 with Mr. Posdal in connection with your 09:21:16
15 expert reports in this case? 09:21:18

16 A. It was more than once. It 09:21:20
17 was -- boy, and when you say "in 09:21:30
18 connection with this case," are you 09:21:33
19 talking about my initial report, or 09:21:35
20 through my most recent report? 09:21:44

21 Q. I would say all of your 09:21:48
22 reports. It will be important for us 09:21:49
23 to kind of understand when you spoke to 09:21:51
24 Mr. Posdal for all of your reports. 09:21:53

25 A. Okay. I would say probably 09:21:55

1 R. BERO

2 somewhere in the range of five to eight 09:22:08

3 times. But I don't, I don't know 09:22:11

4 exactly. Similar to Mr. Johnson, you 09:22:14

5 know, I don't know the exact number. 09:22:18

6 Q. Similar to Mr. Johnson, when 09:22:20

7 you spoke with Mr. Posdal, would the 09:22:25

8 notes of those conversations have been 09:22:29

9 incorporated into the ongoing draft 09:22:31

10 report? 09:22:33

11 A. Probably with the exception 09:22:37

12 of, I remember talking to Mr. Posdal a 09:22:41

13 year and a half ago, and at that point 09:22:53

14 I don't know that we would have even 09:22:58

15 been talking about a draft report. So 09:23:00

16 to the extent I spoke with, you know, 09:23:07

17 during that conversation I would not 09:23:12

18 have been taking notes in a draft 09:23:14

19 report, if that answers your question. 09:23:17

20 Q. Yes, thank you. And I assume 09:23:24

21 you didn't tape any of the 09:23:29

22 conversations you had with Mr. Posdal? 09:23:32

23 A. That's correct. 09:23:33

24 Q. And my understanding is you 09:23:34

25 don't have any kind of separate notes 09:23:37

1 R. BERO

2 I know you referenced in your earlier 09:38:01
3 answer that you discussed the 50,000 09:38:03
4 chip number with him, and that you said 09:38:06
5 that he expressed that that seemed on 09:38:08
6 the low side. So he didn't, for 09:38:10
7 example, point you to any, you know, 09:38:13
8 forecasting documents they had done or 09:38:15
9 anything like that with respect to that 09:38:18
10 part of the conversation; is that 09:38:20
11 right? 09:38:22

12 A. That's correct. 09:38:22

13 Q. So let's talk about your 09:38:27
14 conversation with Ms. Sargent. Can 09:38:29
15 you, you said it was just once; is that 09:38:32
16 right? 09:38:34

17 A. I know it was at least once. 09:38:34
18 It may have been just once, but I can't 09:38:38
19 remember if we had a follow-up 09:38:43
20 conversation as well. I just don't, I 09:38:45
21 don't recollect. 09:38:50

22 Q. And do you recall 09:38:50
23 approximately how long you spent with 09:38:51
24 Ms. Sargent? 09:38:54

25 A. I don't know exactly. This 09:38:54

1 R. BERO

2 goes back probably to November of 2022 09:39:01
3 sometime. I don't -- I mean, as I'm 09:39:11
4 sitting here, I don't recollect it 09:39:15
5 being, you know, a real extensive 09:39:17
6 conversation, but maybe an hour would 09:39:21
7 be a guesstimate. 09:39:29

8 Q. At a high level, can you 09:39:35
9 recall what you discussed with 09:39:36
10 Ms. Sargent in this conversation? 09:39:38

11 A. Yeah, we talked about -- we 09:39:39
12 talked a little bit about her 09:39:46
13 background and her knowledge in the 09:39:49
14 industry, and I believe she was a 09:39:52
15 consultant to Marin County Hospital, 09:39:57
16 and was aware of this SIS program. And 09:40:04
17 she worked for an entity, I forget the 09:40:15
18 name of it off the top of my head, that 09:40:18
19 was, is now a part of Vizient. And 09:40:22
20 these kinds of programs generally, and 09:40:27
21 her expectation, and specifically I 09:40:33
22 recollect we talked about the adoption 09:40:39
23 rate, if you will, of the program 09:40:43
24 within these hospitals that I'm relying 09:40:45
25 on for my calculation, as you are 09:40:54

1 R. BERO

2 undoubtedly aware of. 09:40:56

3 But I think those were the 09:40:59
4 primary things we talked about as I'm 09:41:01
5 sitting here. But again the, you know, 09:41:03
6 the key information would be identified 09:41:05
7 and sourced in my reports. 09:41:10

8 Q. Do you recall if Ms. Sargent 09:41:15
9 provided any documents to you as a part 09:41:17
10 of that conversation? 09:41:20

11 A. I don't recollect any. 09:41:23

12 Q. With respect to Mr. Humphrey, 09:41:32
13 do you recall how long your 09:41:41
14 conversation with Mr. Humphrey was? 09:41:43

15 A. Yeah, I, again, I believe it 09:41:46
16 was relatively short. Perhaps shorter 09:41:50
17 than the other conversations we've been 09:41:53
18 talking about. I just don't recollect. 09:41:58

19 Q. What was the high-level topic 09:42:01
20 of the conversation? 09:42:02

21 A. I can't, as I'm sitting here, 09:42:07
22 I'm drawing a blank as to what we spoke 09:42:14
23 about. We maybe talked about the FDA 09:42:20
24 issue, but I just, I don't recollect as 09:42:24
25 I'm sitting here. 09:42:37

1 R. BERO

2 Perhaps if we looked through 09:42:40

3 my reports, it would jog my memory. 09:42:44

4 Q. Understood, and I'm sure 09:42:47

5 we'll probably get to it at some point 09:42:48

6 today. Do you recall if Mr. Humphrey 09:42:50

7 gave you any documents during the 09:42:53

8 conversation? 09:42:54

9 A. Not that I recall, no. 09:42:54

10 Q. Again, kind of back to the 09:43:02

11 process point of these notes that go 09:43:04

12 into the drafts. Does there come a 09:43:06

13 point in time, as you continue editing, 09:43:09

14 that some of the information that you 09:43:11

15 learned from these interviews may be 09:43:13

16 removed from the draft, just as you 09:43:15

17 continue the editing process? Does 09:43:18

18 that make sense? 09:43:19

19 A. Well, I wouldn't say it's 09:43:21

20 removed, necessarily, but just the 09:43:24

21 process is where we may have a point 09:43:30

22 addressed in multiple areas, or a 09:43:38

23 similar point, and it may get, maybe be 09:43:39

24 too redundant, if you will, and so 09:43:44

25 while we've already addressed it, we 09:43:48

1 R. BERO

2 rough guess. But I don't, I don't 09:50:43
3 know, for example, how many projects 09:50:48
4 our other experts that are at our firm 09:50:51
5 are working on, other than really rough 09:50:55
6 estimates. 09:50:58

7 Q. Do you know, like, for 09:51:00
8 example what proportion of the Bero 09:51:06
9 Group's income in 2022 came from this 09:51:08
10 matter? 09:51:11

11 A. I can -- I would say 09:51:13
12 somewhere -- I would guesstimate 09:51:33
13 somewhere between 5 and 10 percent. 09:51:39

14 Q. And you've been deposed 09:51:42
15 before, correct? 09:51:47

16 A. I have. 09:51:48

17 Q. Have you testified at trial 09:51:50
18 before? 09:51:51

19 A. Yeah. 09:51:52

20 Q. Have you ever worked with SIS 09:51:54
21 before? 09:51:57

22 A. No. 09:51:59

23 Q. Have you ever worked with the 09:51:59
24 law firm Haley Guiliano before? 09:52:02

25 A. I'm not sure. I don't think 09:52:13

1 R. BERO

2 I have. Although I may have. I don't 09:52:19
3 think so. 09:52:24

4 Q. So let's talk a little bit 09:52:24
5 about your background. In your report, 09:52:31
6 you say that you're a certified public 09:52:36
7 accountant, accredited in business 09:52:39
8 valuation, a certified valuation 09:52:41
9 analyst, and the managing director of 09:52:45
10 The Bero Group. That's on page 3 of 09:52:47
11 your original report in December, so I 09:52:50
12 would just like to talk about those 09:52:53
13 things a little bit. 09:52:54

14 So we've already talked about 09:52:55
15 managing director of The Bero Group. 09:52:57
16 So you're a certified public 09:52:58
17 accountant; is that right? 09:53:00

18 A. Yes. 09:53:01

19 Q. How long have you been a CPA? 09:53:01

20 A. Longer than you -- I think I 09:53:07
21 passed my exam in 1987, and so when you 09:53:11
22 say "CPA," there's, you pass your exam, 09:53:20
23 and then you have to get certified, and 09:53:25
24 that's a function of having -- and 09:53:30
25 licensed. It's a function of having 09:53:34

1 R. BERO

2 the requisite experience. And I think, 09:53:36

3 I can't remember if that was at the 09:53:40

4 same time or around the same time. And 09:53:41

5 so it's been since the late '80s. 09:53:51

6 Q. When did you form The Bero 09:53:56

7 Group? 09:54:00

8 A. Well, I guess without -- I 09:54:00

9 started the firm, with another 09:54:08

10 individual, called Corporate Financial 09:54:10

11 Advisors in 2005, I think it was -- oh, 09:54:12

12 no, 1995 I think it was. And an 09:54:17

13 accounting firm as well. And then that 09:54:23

14 firm that turned into, we sort of 09:54:34

15 separated out our, what we refer to as 09:54:37

16 our litigation services and valuation 09:54:40

17 services capabilities into what we 09:54:42

18 called The Bero Group. 09:54:44

19 The Bero Group itself became 09:54:47

20 a formal entity, I believe, in 2013, so 09:54:49

21 about 10 years ago. 09:54:53

22 Q. And before The Bero Group, 09:55:01

23 based on your CV, it looks like you 09:55:05

24 worked at a place called Coopers & 09:55:08

25 Lybrand; is that right? 09:55:11

1 R. BERO

2 valuation, under the AICPA. 09:59:20

3 The AICPA had its own process 09:59:24

4 for the ABV. I think it was, quite 09:59:27

5 frankly, less vigorous than the 09:59:31

6 NACVA's, or National Association of 09:59:38

7 Certified Valuation Analysts' process, 09:59:40

8 and at some point they offered CPAs 09:59:43

9 that were CVAs as well the ability to 09:59:50

10 obtain the ABV designation with what I 09:59:58

11 would describe as relatively minimal 10:00:08

12 requirements, because in a sense they 10:00:12

13 recognized that if you're a CVA, you 10:00:16

14 would reasonably meet the requirements 10:00:19

15 as under the ABV guidelines. 10:00:21

16 And I think you had to get 10:00:28

17 some recommendations from some other 10:00:29

18 ABVs that you have worked with. 10:00:33

19 Something along those lines. And this 10:00:36

20 goes back, you know, quite a ways, so I 10:00:38

21 can't remember exactly. 10:00:42

22 Q. Understood. So focusing in 10:00:42

23 on this CVA certification, do you 10:00:45

24 recall what you had to do in order to 10:00:48

25 receive that certification? 10:00:50

1 R. BERO

2 A. Yeah, so the CVA, at the time 10:00:53
3 that I obtained my CVA, there was a 10:00:58
4 process where you took a course. I 10:01:05
5 believe it was a week long course. You 10:01:11
6 had to have certain requirements, you 10:01:13
7 know, background requirements, and 10:01:16
8 having worked in valuation-related 10:01:18
9 areas, you had to pass a test and do a 10:01:21
10 valuation, had to do some sort of a 10:01:33
11 valuation that was then reviewed, and I 10:01:42
12 don't want to say graded, but 10:01:51
13 determined as to whether or not you 10:01:55
14 passed. And I did that, again, this is 10:01:56
15 18 or 20 years ago, something along 10:02:01
16 those lines. 10:02:03

17 Q. Once you are certified as a 10:02:09
18 CVA, are there any kind of continuing 10:02:11
19 educational requirements for the 10:02:14
20 certification? 10:02:15

21 A. There are. It's, you know, 10:02:15
22 whether you're a CPA or CVA, there's 10:02:20
23 ongoing requirements. They're slightly 10:02:23
24 different, but many of the things that 10:02:29
25 I've done over the years would address 10:02:34

1 R. BERO

2 both of those kinds of requirements. 10:02:36

3 And I don't know, I couldn't tell you 10:02:40

4 exactly how many hours or years or 10:02:42

5 whatnot are required. There's 10:02:47

6 different things, and there's different 10:02:49

7 time frames, and so forth. But yes, 10:02:53

8 there are. 10:02:56

9 Q. So is it, like, actual 10:02:56

10 trainings you would attend, or how does 10:02:58

11 it work? 10:02:59

12 A. I'm sorry, you cut out. What 10:03:00

13 was the question? 10:03:04

14 Q. Sorry. I said, are there 10:03:04

15 trainings you would attend as part of 10:03:10

16 this process? 10:03:11

17 A. There are trainings that you 10:03:11

18 can attend. In my case I've gone to 10:03:12

19 some trainings over the years, I've 10:03:17

20 taught quite a bit, and I've written 10:03:21

21 and -- but yes, yeah, similar to CLE, 10:03:37

22 for example. 10:03:41

23 Q. Understood. And you are not 10:03:43

24 a surgeon, correct? 10:03:46

25 A. I'm not a surgeon? 10:03:48

1 R. BERO

2 Q. Correct. 10:03:50

3 A. I am not a surgeon, that is 10:03:51

4 correct. 10:03:53

5 Q. And you've never worked in a 10:03:53

6 hospital, correct? 10:03:55

7 A. That's correct. 10:03:58

8 Q. Have you ever worked in any 10:04:00

9 business that you would view as being 10:04:05

10 in the medical industry? 10:04:07

11 A. Well, I worked on cases, a 10:04:11

12 number of cases over the years, in the 10:04:15

13 medical industry. But, setting that 10:04:19

14 aside, no, I haven't worked directly in 10:04:26

15 the medical industry as an employee, 10:04:29

16 per se. 10:04:38

17 Q. Before this matter, had you 10:04:39

18 ever worked on a matter involving 10:04:41

19 robotic surgery? 10:04:43

20 A. Robotic surgery? 10:04:45

21 Q. Correct. 10:04:48

22 A. I guess it depends on what 10:04:49

23 you consider robotic. I mean, I've 10:04:55

24 worked on cases involving endoscopies, 10:05:00

25 or AKs involving endoscopies. And I 10:05:10

1 R. BERO

2 worked on another case involving -- I 10:05:24

3 can't remember exactly what it was. 10:05:32

4 But I think it had to do with -- it was 10:05:33

5 in the medical field involving, I 10:05:36

6 believe, some moving devices. Whether 10:05:40

7 you consider those robotics or not, I 10:05:50

8 guess is the question. 10:05:52

9 Q. On the endoscopy case, was 10:05:59

10 that a litigation matter? 10:06:06

11 A. Yes. 10:06:07

12 Q. Do you recall if you offered 10:06:08

13 an expert opinion in the matter? 10:06:12

14 A. I don't know if I actually 10:06:17

15 submitted a report in that case or not. 10:06:21

16 I know it didn't go to trial, and I 10:06:26

17 can't remember if I submitted a report. 10:06:35

18 I just don't recollect. When I say 10:06:37

19 "report," I mean expert report. 10:06:41

20 Q. Understood. Do you recall, 10:06:43

21 kind of, the general nature of what you 10:06:45

22 were being asked to look at? Like, for 10:06:48

23 example, was it a lost profits issue? 10:06:50

24 A. It was either lost profits or 10:06:55

25 a reasonable royalty or both. But I 10:07:04

1 R. BERO

2 don't remember. 10:07:10

3 Q. Do you recall approximately 10:07:16

4 the time frame of the case? 10:07:17

5 A. It was a long time ago. It 10:07:19

6 was probably 20 years ago, would be my 10:07:25

7 guess. 10:07:31

8 Q. Another matter that you 10:07:32

9 mentioned, I think you used the word 10:07:35

10 "devices," but I didn't quite catch how 10:07:37

11 you referred to them. What kind of a 10:07:40

12 matter was that? 10:07:42

13 A. That's what I'm trying to 10:07:43

14 remember. It had -- I just wish I 10:07:44

15 could remember the technology. I 10:07:52

16 thought it had to do with, it was some 10:08:00

17 device, I just can't remember exactly 10:08:02

18 what it was used for. But it was a 10:08:07

19 medical device. And this one was more 10:08:09

20 recent than the other one, but I don't 10:08:18

21 believe we submitted or I submitted an 10:08:25

22 expert report in that one. 10:08:28

23 Q. Do you recall the issue that 10:08:30

24 you, again, may have been looking at? 10:08:36

25 Like, for example, was it lost profits? 10:08:38

1 R. BERO

2 A. I think it was -- I think it 10:08:39
3 was, I don't remember if it was lost 10:08:55
4 profits -- it would have been, I think 10:08:58
5 it was a patent case, and patent 10:09:00
6 related. So it likely would have been 10:09:02
7 lost profits, or royalty -- reasonable 10:09:08
8 royalty, or both. But again, in that 10:09:16
9 one I don't believe I submitted an 10:09:20
10 expert report. 10:09:21

11 Q. You used the term "reasonable 10:09:22
12 royalty" a couple of times. What is a 10:09:26
13 reasonable royalty? 10:09:28

14 A. So "reasonable royalty" is a 10:09:29
15 term that's used for a common form of 10:09:35
16 damages in patent litigation, patent 10:09:39
17 infringement, and also is used in trade 10:09:45
18 secrets, copyright, trademarks. And in 10:09:54
19 some cases, design patents. 10:09:59

20 Q. So I know -- 10:10:07

21 A. I would give you more, but -- 10:10:08

22 Q. No, that's good, thank you. 10:10:11
23 So I know we started out talking about 10:10:13
24 if you ever worked on matters involving 10:10:15
25 robotic surgery, so just to take it out 10:10:19

1 R. BERO

2 a little broader, I know you mentioned 10:10:21
3 a medical device case, but did you work 10:10:23
4 on any other cases that you can recall 10:10:26
5 that you would think of as a medical 10:10:29
6 device? 10:10:32

7 A. Medical devices. Yes. I've 10:10:32
8 worked on a case involving coils in MRI 10:10:47
9 imaging devices. I've worked on a case 10:10:58
10 in the CT scanner device area. I guess 10:11:06
11 it depends if you consider those 10:11:14
12 devices or not. 10:11:16

13 I worked on a case involving 10:11:20
14 bone, egg bone (phonetic) I guess is 10:11:33
15 what you would refer to it as. I don't 10:11:36
16 know if you would consider that a 10:11:38
17 device, maybe not. I worked on a case 10:11:39
18 involving bone implants from, I think, 10:11:41
19 cadavers or nonhuman bone sources. 10:11:53
20 Perhaps that's a device. I worked on 10:12:01
21 cases involving humeral, like shoulder, 10:12:03
22 nails. I've worked on cases involving 10:12:17
23 spine implant reconstruction devices. 10:12:28
24 And, you know, those come to mind. 10:12:45
25 There's probably more than that, but 10:12:47

1 R. BERO

2 those are a few. 10:12:50

3 Q. And the ones you just listed, 10:12:51

4 were those patent cases? 10:12:54

5 A. Some, not all. 10:12:58

6 Q. Do you recollect which ones 10:13:00

7 were not patent cases? 10:13:03

8 A. The CT scanner case, computed 10:13:09

9 tomography case, that had to do with a 10:13:20

10 contract, I believe. There was 10:13:27

11 technology, but it was also, I think 10:13:33

12 the dispute was contractual in nature. 10:13:36

13 The spinal implants case, 10:13:47

14 well, it was a variety of things, but 10:13:59

15 then it got whittled down to a fraud 10:14:03

16 issue, I think. My role was primarily 10:14:11

17 a contract trade secrets kind of an 10:14:13

18 analysis, as I recollect. 10:14:16

19 Q. So in the CT scanner case, 10:14:22

20 did you offer an expert opinion in that 10:14:26

21 case? 10:14:29

22 A. I believe so. I believe so. 10:14:30

23 I testified. 10:14:33

24 Q. Do you recall the topic of 10:14:36

25 your testimony? 10:14:38

1 R. BERO

2 A. I don't. And I don't mean to 10:14:38
3 chuckle, if you will, but it was an 10:14:44
4 arbitration, and it was probably 10:14:47
5 25 years ago. 10:14:51

6 Q. And same question on the 10:14:52
7 spine implant case. Did you offer an 10:14:57
8 expert opinion in that case? 10:14:59

9 A. Did you ask if I offered an 10:15:01
10 opinion? 10:15:05

11 Q. Yes. 10:15:05

12 A. I submitted a report and I 10:15:06
13 testified in deposition. By the time 10:15:10
14 the case went to trial, I didn't 10:15:16
15 testify because there were multiple 10:15:18
16 claims, and they whittled them down to, 10:15:23
17 I believe it was just a fraud issue, 10:15:28
18 which my analysis didn't address. 10:15:32

19 Q. Do you recall the nature of 10:15:34
20 your analysis in the case? 10:15:36

21 A. It was probably, I'm trying 10:15:37
22 to -- I apologize, this goes back a few 10:15:56
23 years. It was probably lost profits. 10:15:59
24 I think that's what it was. 10:16:18

25 Q. About how long ago was that 10:16:19

1	R. BERO	
2	case?	10:16:22
3	A. I don't, maybe eight years	10:16:25
4	ago.	10:16:31
5	MR. VAN HOVEN: Guys, I'm not	10:16:35
6	trying to break up the fun, but we	10:16:37
7	have been going an hour. We can	10:16:38
8	break whenever, just making	10:16:40
9	Mr. Bero aware of that. I'll let	10:16:43
10	you let us know if you want to take	10:16:44
11	a break. Or do you want to go	10:16:47
12	fairly soon?	10:16:49
13	THE WITNESS: I'm fine, as	10:16:51
14	long as you guys are fine.	10:16:53
15	MR. VAN HOVEN: Okay, sounds	10:16:54
16	good.	10:16:56
17	MS. BASS: I just have a	10:16:56
18	couple more questions in this	10:16:58
19	section, so maybe we can just do	10:16:59
20	those and then we can take a break,	10:17:01
21	if that works.	10:17:03
22	THE WITNESS: Okay.	10:17:04
23	Q. Have you ever provided an	10:17:05
24	expert opinion in an antitrust case	10:17:07
25	before?	10:17:09

1 R. BERO

2 A. Yes. 10:17:10

3 Q. And can you describe for me, 10:17:10

4 in how many instances have you provided 10:17:16

5 an expert opinion in an antitrust case? 10:17:18

6 A. I'm not sure. I know of one. 10:17:22

7 I can recollect one. 10:17:44

8 Q. What was that case about? 10:17:45

9 A. That case was about medical 10:17:46

10 software technology, is my 10:18:02

11 recollection. 10:18:10

12 Q. And about how long ago was 10:18:18

13 the case? 10:18:22

14 A. Four or five years ago. 10:18:22

15 Q. Do you recall the nature of 10:18:34

16 your opinions in the case? 10:18:37

17 A. Sort of. I don't mean to -- 10:18:38

18 I believe it had to do with lost 10:18:54

19 profits. But it may have also had to 10:18:58

20 do with -- there are a multitude of 10:19:03

21 factors and issues and a long period of 10:19:15

22 time in that particular case. Not that 10:19:19

23 you care about that. But, so, there 10:19:24

24 were just a lot of different issues in 10:19:28

25 that case. So my recollection is the 10:19:29

1 R. BERO

2 issue was, perhaps, well, it was lost 10:19:34
3 profits in part, but it may have also 10:19:39
4 been other things, too, and I just 10:19:43
5 don't remember what those are. Maybe 10:19:45
6 royalty. I can't remember. 10:19:47

7 Q. Do you recall if you 10:19:49
8 testified at trial in the matter? 10:19:51

9 A. I did not testify at trial in 10:19:53
10 that matter. That's my -- I know I 10:20:00
11 didn't. 10:20:12

12 Q. Do you recall if you were 10:20:12
13 qualified by the court as an expert in 10:20:17
14 the matter? 10:20:19

15 A. I don't know. To the extent 10:20:22
16 it got to that point, I assume I was. 10:20:30
17 But I believe the other expert maybe 10:20:34
18 was excluded ultimately. But I'm not, 10:20:41
19 I don't remember exactly what happened. 10:20:48

20 Q. Do you recall the name of the 10:20:50
21 parties in the case? 10:20:57

22 A. Yes. OptumInsight was my 10:20:58
23 client, the client that I was working 10:21:04
24 on behalf of. Cave Consulting, I 10:21:06
25 believe, was the name of the other 10:21:11

1 R. BERO

2 party. I think that's what it was 10:21:15
3 called. 10:21:19

4 Q. So you said that it was maybe 10:21:20
5 a lost profits analysis and maybe a 10:21:27
6 royalty. So you might not recall this, 10:21:30
7 but do you recall kind of what the 10:21:33
8 methodology was for the lost profits 10:21:36
9 analysis that you may have done? 10:21:38

10 A. Well, in that particular 10:21:41
11 case, I don't exactly. I can't 10:21:47
12 recollect -- I mean, there were lots of 10:21:57
13 different layers in that case. I think 10:22:01
14 -- that's a good question. I can't 10:22:09
15 remember. But, you know, what we 10:22:13
16 always do, and I believe we did in that 10:22:17
17 case, is we look at what would have 10:22:18
18 happened, and compared it to what 10:22:22
19 actually has or will likely happen. 10:22:26
20 And that's my recollection of what we 10:22:30
21 did in that case. 10:22:38

22 MS. BASS: Can we go off the 10:22:38
23 record? 10:22:40

24 THE VIDEOGRAPHER: Sure. The 10:22:41
25 time is 10:22 a.m., we are now off 10:22:44

1 R. BERO

2 report was meant to respond to the 10:39:05

3 report of Mr. Smith in the case; is 10:39:07

4 that right? 10:39:09

5 A. Yeah. 10:39:13

6 Q. And I'll do my best to call 10:39:14

7 it the second rebuttal report. At 10:39:21

8 times I may say the reply report, but 10:39:23

9 I'll attempt to say the second rebuttal 10:39:25

10 report. 10:39:28

11 A. Yes, the second was meant to 10:39:28

12 reply to Mr. Smith's rebuttal report. 10:39:30

13 That's what you asked me, I think? 10:39:37

14 Q. Yes. 10:39:38

15 A. Yeah. 10:39:39

16 Q. Okay, got it. Okay. So do 10:39:39

17 your opening and second rebuttal 10:39:42

18 reports contain all of your opinions in 10:39:45

19 this matter? 10:39:46

20 A. Well, I also had, we have a 10:39:58

21 -- okay, so my opening, my rebuttal 10:40:01

22 reports contain all the reports I 10:40:11

23 submitted. So there's the errata, 10:40:12

24 which was dated, let's see, 10:40:24

25 February 25th, the updated errata 10:40:31

1 R. BERO

2 sheet. Including that, yes, includes 10:40:34
3 all my opinions. 10:40:40

4 Q. Do your reports contain all 10:40:42
5 the facts and data that you considered 10:40:46
6 in forming your opinions? 10:40:48

7 A. Yes, I certainly intended 10:40:54
8 that to be the case. 10:40:56

9 Q. Does your attachment one to 10:40:57
10 your report include the materials you 10:41:03
11 consulted in forming your opinions? 10:41:09

12 A. The various attachment ones 10:41:10
13 in my, attached to my various reports 10:41:12
14 capture the data that I considered, 10:41:16
15 and, my team and I considered. 10:41:23

16 Q. Did you review any other 10:41:27
17 expert reports from this litigation in 10:41:29
18 drafting your reports aside from 10:41:31
19 Dr. Smith's report? 10:41:36

20 A. Did I review any other 10:41:42
21 reports? Well, I don't think I had 10:41:43
22 Dr. Smith -- did I have Dr. Smith? I 10:41:46
23 don't think I had Dr. Smith's report 10:41:49
24 when I submitted my first report. 10:41:56
25 Other than, I believe -- Dr. Smith, 10:42:02

1 R. BERO

2 case, and oftentimes our role as CPAs 10:48:20

3 is to analyze damages and determine 10:48:28

4 what damages are. 10:48:31

5 Q. So as part of the overall 10:48:41

6 role that you just discussed of a CPA, 10:48:43

7 when a CPA approves certain financial 10:48:45

8 statements, do they give some sort of, 10:48:47

9 kind of level of assurance that the 10:48:51

10 statements are accurate? 10:48:53

11 A. So if you're talking about a, 10:49:03

12 sort of the auditing function of the 10:49:09

13 CPA, sort of that group, that public 10:49:10

14 accounting service companies provide, 10:49:15

15 they're providing an opinion based on 10:49:20

16 some level of assurance. 10:49:27

17 However, if you consider the, 10:49:31

18 you know, the ultimate opinion, if you 10:49:38

19 will, it's dependent upon 10:49:41

20 representations of management. That's 10:49:45

21 a term, phrase that's often used, 10:49:48

22 whether they're providing a, what's 10:49:53

23 referred to as an unqualified audit 10:49:55

24 opinion or a qualified audited opinion. 10:49:59

25 Whether they're providing a, what's 10:50:04

1 R. BERO

2 referred to as a review, or a 10:50:07
3 compilation. They're providing, in 10:50:14
4 some cases, in different levels, 10:50:24
5 assurance, to some extent. However, 10:50:29
6 it's always dependent upon information 10:50:32
7 that's provided to them by their 10:50:35
8 client. 10:50:38

9 Q. So you heard the term before, 10:50:38
10 "CPA compiled;" is that right? 10:50:44

11 A. "CPA compiled?" I'm not sure 10:50:46
12 -- I mean, there's -- I'm not sure I've 10:50:55
13 heard that term specifically, that it 10:51:01
14 has any sort of particular meaning. 10:51:03
15 I've heard of what we have referred to 10:51:07
16 as compilations. 10:51:10

17 Q. Okay. Okay, I'll use that 10:51:12
18 term. So what are compilations? 10:51:18

19 A. What's that? 10:51:20

20 Q. What are compilations? 10:51:22

21 A. Well, and it's, bear in mind 10:51:24
22 these are public accounting 10:51:28
23 distinctions that have changed 10:51:32
24 slightly, perhaps, over the years. And 10:51:36
25 I used to be an instructor for a 10:51:38

1 R. BERO

2 national CPA review course, and I know 10:51:41
3 some of the terminology has changed 10:51:45
4 over the course of time. But generally 10:51:48
5 speaking, a compilation would be a 10:51:50
6 situation where a company provides its 10:51:55
7 data to a CPA, and the CPA puts it in 10:52:03
8 the form of a set of financial 10:52:08
9 statements. Could be a balance sheet, 10:52:12
10 could be cash flow statement, could be 10:52:16
11 an income statement, could be a 10:52:19
12 combination. Could be a change in cash 10:52:21
13 flow statement. But it's simply, 10:52:23
14 they're compiling the data that's 10:52:26
15 provided to them. 10:52:28

16 Q. Do such statements at times 10:52:29
17 carry any sort of, kind of disclaimer 10:52:36
18 on them? 10:52:38

19 A. A disclaimer? 10:52:39

20 Q. Yes. 10:52:40

21 A. There used to be specific 10:52:41
22 wording that was common in the big, 10:52:45
23 used to be the Big Eights, now it's the 10:52:50
24 Big Four firms. And all the local 10:52:54
25 firms had their own sort of twist on 10:52:58

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2 the wording that's associated with a 10:53:01
3 compilation. And yeah, they would have 10:53:04
4 a certain disclaimer, if you will, on 10:53:10
5 that data. Or on those compilations, I 10:53:16
6 should say. 10:53:21

7 Q. And is the purpose of the 10:53:22
8 disclaimer to note that the CPA isn't 10:53:27
9 providing any sort of, kind of 10:53:29
10 assurance about the information in the 10:53:30
11 compilation? 10:53:32

12 A. Yeah, I think you could 10:53:41
13 interpret it that way. It's basically, 10:53:44
14 yeah, on a very high level, it's, Hey, 10:53:49
15 look, we just got this data, and we put 10:53:53
16 it in the form of financial statements. 10:53:58
17 That's all we did. 10:54:00

18 Q. The CPA is compiling the 10:54:01
19 information, to use the term, correct? 10:54:03

20 A. Yeah. 10:54:06

21 Q. And not necessarily offering 10:54:07
22 any sort of form of assurance regarding 10:54:12
23 the accuracy of the information, 10:54:13
24 correct? 10:54:14

25 A. Yeah, I think that's correct. 10:54:15

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2 That's the intent, is so that the CPA 10:54:24
3 isn't held responsible for the accuracy 10:54:29
4 of the data. And to a larger extent, 10:54:33
5 that holds true in an audit, too, 10:54:36
6 whether it's an unqualified opinion or 10:54:39
7 otherwise. 10:54:42

8 Q. And your prior answer, when 10:54:46
9 you discussed a compilation, you also 10:54:48
10 mentioned a review. How would you 10:54:50
11 describe what a review is? 10:54:52

12 A. Yes, so a review 10:54:56
13 traditionally, and I'm not sure that 10:54:59
14 they even refer to them as reviews 10:55:03
15 anymore, perhaps they do, but it's a, I 10:55:07
16 guess it's a little bit more guidance 10:55:13
17 or oversight that the CPA provides. 10:55:18
18 And it's, again, whenever financial 10:55:22
19 statements are, or were, presented as a 10:55:27
20 review, there was certain wording that 10:55:33
21 was used to indicate that it was a 10:55:38
22 review. And it would be beyond a 10:55:44
23 simple compilation. It might be a 10:55:50
24 consideration of -- it may have some 10:55:56
25 more information on the business 10:56:00

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2 itself. It might provide more 10:56:01
3 footnotes to financial statements. 10:56:05
4 Describing the operations of the 10:56:07
5 company. And it might involve some 10:56:09
6 additional suggestions and questions 10:56:20
7 that were presented to or asked of the 10:56:22
8 management of the entity. 10:56:24

9 Q. So the review would provide, 10:56:32
10 I think you said, more of an assurance 10:56:37
11 of the accuracy than just a 10:56:38
12 compilation; is that right? 10:56:40

13 A. It would provide, I guess, a 10:56:41
14 higher level of, I don't want -- maybe 10:56:47
15 "assurance" is the right word, but it's 10:56:52
16 a higher level of, the CPA is more 10:56:56
17 involved in understanding what the 10:57:02
18 company is, and what it does. It could 10:57:03
19 uncover things that perhaps weren't 10:57:14
20 otherwise considered in a compilation. 10:57:19
21 It may, it may not. It really depends 10:57:26
22 on the extent of the process that's 10:57:29
23 employed in the review. 10:57:32

24 Q. So it sounds like in a 10:57:40
25 review, there's at least some more 10:57:41

1 R. BERO

2 limited inquiry that the CPA does as a 10:57:43
3 part of a review, versus a compilation; 10:57:46
4 is that fair? 10:57:49

5 A. Correct, correct. 10:57:49

6 Q. And then you've referenced 10:57:51
7 audited financial statements. What is 10:57:54
8 an audited financial statement? 10:57:55

9 A. Audited financial statements 10:57:57
10 are, there's a more comprehensive 10:58:04
11 review of the entity, and so for 10:58:08
12 example, public companies have annual 10:58:12
13 audits. They have to have an annual 10:58:18
14 audit, and so that would involve more 10:58:20
15 review of the company financial data. 10:58:28
16 Perhaps more discussion with the people 10:58:37
17 at the company, issues related to the 10:58:50
18 inventory, what's in inventory, how do 10:58:51
19 you do inventory. In some cases they 10:58:53
20 would, historically used to, anyway, do 10:58:57
21 physical inventories. Or on some 10:59:00
22 limited level, they would test data in 10:59:05
23 some cases. So it's a more, it's a 10:59:13
24 more involved process associated with 10:59:18
25 reviewing the company and data, and 10:59:24

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2 then ultimately submitting an audit 10:59:27
3 opinion. If it's unqualified, the 10:59:32
4 auditors are, on a material basis, they 10:59:36
5 found nothing of materiality that is of 10:59:40
6 concern, they may have a qualified 10:59:48
7 opinion which points out one or two or 10:59:52
8 more issues or areas that they haven't 10:59:56
9 been able to resolve, or maybe some 11:00:05
10 uncertainties associated with the 11:00:07
11 business. 11:00:09

12 Q. And as a CPA does a 11:00:09
13 compilation or a review or an actual 11:00:23
14 audited financial statement, is it 11:00:26
15 important to the CPA to rely upon 11:00:29
16 reliable information from the company? 11:00:31

17 A. Well, it helps. Certainly 11:00:37
18 ideally, the information that's 11:00:42
19 provided is accurate and complete. In 11:00:45
20 some cases, you know, a CPA, in the 11:00:51
21 process of the audit, they'll try to 11:00:57
22 help discern whether or not it is, and 11:01:01
23 that's part of the process of the 11:01:04
24 audit. In other cases, you know, they 11:01:06
25 just have to rely on representations of 11:01:12

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2 management or whomever at the company 11:01:14
3 that the information is accurate. But 11:01:17
4 that's, you know, a process -- that's 11:01:20
5 the intent of the audit, is to review 11:01:22
6 the financial information to ideally 11:01:24
7 uncover adjustments, or making sure, to 11:01:29
8 the best of their ability, they can 11:01:32
9 present accurate financial statements. 11:01:36

10 Q. So is part of the purpose of 11:01:38
11 an audit of a CPA to kind of try to 11:01:42
12 assess the reliability of the 11:01:45
13 information that's been provided by the 11:01:47
14 company? 11:01:48

15 A. Yes, but the intent is to 11:01:49
16 present reliable financial statements. 11:01:59
17 That's the intent. And so part of that 11:02:02
18 process is trying to audit and verify, 11:02:05
19 if you will, that the information that 11:02:13
20 flows up into those financial 11:02:17
21 statements is reliable. 11:02:19

22 Q. Does a CPA similarly try to 11:02:25
23 verify the information as part of a 11:02:27
24 review, or no? 11:02:28

25 A. I'm sorry, you cut out. 11:02:30

1 R. BERO

2 Q. Sorry. 11:02:32

3 A. That's okay. 11:02:33

4 Q. I can repeat. I said, does a 11:02:34

5 CPA attempt to verify information as 11:02:37

6 part of a review? 11:02:39

7 A. I'm not sure. To be honest, 11:02:40

8 I don't recollect the rigor, if you 11:03:01

9 will, that's required or expected in 11:03:04

10 the review. There could be different 11:03:08

11 levels, and it could be a function of, 11:03:18

12 you know, what specifically the CPA was 11:03:20

13 hired to review, if that helps. 11:03:25

14 Q. Yes. Would a CPA typically 11:03:40

15 attempt to verify information from a 11:03:42

16 company as part of a compilation? 11:03:44

17 A. Well, I don't know that 11:03:46

18 that's necessarily the role of a CPA in 11:03:50

19 that instance, but the CPA is going to 11:03:52

20 compile the information, and ideally is 11:04:07

21 going to be providing guidance. 11:04:09

22 So for example, a company 11:04:11

23 might want to hire a certain CPA for a 11:04:13

24 compilation of their financial 11:04:16

25 statements, because that particular CPA 11:04:20

1 R. BERO

2 or CPA firm has experience in that 11:04:23
3 particular industry or with, you know, 11:04:25
4 whatever, so that the CPA can provide 11:04:30
5 some specific guidance. Specialized 11:04:35
6 guidance. Not always, but that could 11:04:39
7 be part of a compilation process. 11:04:44

8 Q. So in this case, did you 11:04:46
9 review any CPA documents related to 11:04:56
10 SIS, financial statements? 11:05:03

11 A. What do you mean by "CPA 11:05:06
12 documents"? 11:05:09

13 Q. Anything created by a CPA for 11:05:10
14 SIS? 11:05:12

15 A. We reviewed, we have a 11:05:14
16 summary of their financial statements 11:05:22
17 for a few of the years that I 11:05:24
18 summarized on one of my schedules. I 11:05:28
19 don't recollect if a CPA reviewed that 11:05:33
20 or compiled that or audited that. I 11:05:36
21 just don't, I don't recollect. 11:05:45

22 Q. From lost profits 11:05:48
23 methodology, have you ever heard of 11:06:00
24 something called a yardstick approach? 11:06:02

25 A. Yes. 11:06:04

1 R. BERO

2 chip, to SIS and its customers. 11:35:35

3 So that's, I guess, 11:35:40

4 inherently assuming Rebotix would have 11:35:42

5 made those sales. Unless, to the other 11:35:45

6 extent, Restore was in a position where 11:35:49

7 it was the one that was supplying the 11:35:51

8 chips, whether or not it was the X/Xi 11:35:55

9 or whether it was also the S, Si chip. 11:35:58

10 Q. So are you assuming that in 11:36:06

11 the but-for world, that Rebotix would 11:36:10

12 only sell to SIS, either through an 11:36:13

13 in-house model or through a distributor 11:36:16

14 model? 11:36:18

15 A. I'm not assuming that they 11:36:18

16 only would have sold to SIS. But 11:36:20

17 certainly, SIS would have been, likely, 11:36:26

18 the majority of their sales for these 11:36:31

19 kinds of, certain products or services. 11:36:35

20 Essentially, the interceptor chip. 11:36:41

21 Q. And you haven't, for example, 11:36:43

22 forecasted what the sales of Rebotix 11:36:48

23 might be in the but-for world, correct? 11:36:52

24 A. I haven't forecasted what 11:36:56

25 Rebotix's sales would have been in the, 11:37:00

1 R. BERO

2 no, other than to the extent, again -- 11:37:05

3 do you mean separate from SIS? 11:37:08

4 Q. Yes. 11:37:10

5 A. No, I haven't specifically 11:37:11

6 done that. Although my understanding 11:37:14

7 is that Rebotix would have been making 11:37:17

8 the majority of their sales through 11:37:21

9 SIS, simply because of their -- well, I 11:37:24

10 mean, based on my understanding of the 11:37:30

11 relationship and how they were, both 11:37:33

12 parties, were approaching that 11:37:37

13 relationship. 11:37:38

14 Q. Are you making any 11:37:38

15 assumptions about what Restore's sales 11:37:43

16 would have been in the but-for world? 11:37:46

17 A. It would be similar to 11:37:47

18 Rebotix. So depending on who, whether 11:37:57

19 it was Restore or Rebotix, had the 11:38:05

20 capability for the X and Xi chip, and, 11:38:07

21 you know, also depending upon whether 11:38:13

22 or not the added RFID encryption on the 11:38:17

23 X and Xi EndoWrists was legal or not, 11:38:24

24 that would, perhaps, factor into who 11:38:31

25 was actually, you know, whether it was 11:38:34

1 R. BERO

2 Restore, Rebotix or a combination of 11:38:37
3 both, making the sales. So I haven't 11:38:40
4 specifically tried to parse that out. 11:38:42
5 We don't know. 11:38:47

6 Q. You're not assuming, though, 11:38:52
7 that Restore only would have sold, you 11:38:54
8 know, for example, chips to SIS in the 11:38:58
9 but-for world, correct? And had no 11:39:01
10 other sales? 11:39:07

11 A. I'm not assuming Restore 11:39:09
12 would have sold just to SIS and had no 11:39:12
13 other sales. No, I'm not assuming 11:39:16
14 that. I mean, perhaps they would have, 11:39:20
15 but I'm not assuming that necessarily, 11:39:24
16 no. 11:39:27

17 MR. VAN HOVEN: Ashley, 11:39:32
18 whenever we get to an appropriate 11:39:33
19 time, it would be a good time to 11:39:37
20 take a break. 11:39:39

21 MS. BASS: We can take one 11:39:39
22 now, that's good. 11:39:42

23 MR. VAN HOVEN: Okay. 11:39:43

24 THE VIDEOGRAPHER: Time is 11:39:44
25 11:39 a.m. Central time on March 8, 11:39:45

1 R. BERO

2 2023. This marks the end of unit 11:39:48

3 two, we are now off the record. 11:39:50

4 (Recess.) 11:39:52

5 THE VIDEOGRAPHER: The time 11:51:50

6 is 11:51 a.m. Central time, 11:51:56

7 March 8, 2023. Back on the record, 11:51:59

8 you may proceed. 11:52:01

9 Q. Mr. Bero, when you were 11:52:05

10 writing your report in this case, did 11:52:07

11 you review any sales forecasts that SIS 11:52:09

12 created in the normal course of its 11:52:12

13 business, for example, in 2018, 2019, 11:52:15

14 2020? 11:52:19

15 A. Not that I recollect, no. 11:52:26

16 Q. So SIS has historically sold 11:52:27

17 less reset EndoWrists than Restore or 11:52:36

18 Rebotix, correct? 11:52:42

19 MR. VAN HOVEN: Objection to 11:52:42

20 form. 11:52:43

21 A. I'm sorry, did you ask if SIS 11:52:43

22 has historically sold less? 11:52:45

23 Q. Correct. 11:52:49

24 A. The, I believe that is true, 11:52:50

25 although I don't remember the exact 11:52:53

1 R. BERO

2 this scenario. 12:16:59

3 A. As you can see here, I'm 12:17:03

4 citing to footnote 418, which is the 12:17:14

5 deposition of Mr. Parker, and I also 12:17:15

6 spoke with Mr. Humphrey about that. 12:17:17

7 I'm trying to... 12:17:30

8 Q. Yeah, take your time. 12:17:31

9 A. I'm looking back now at my 12:17:38

10 up-front assumptions. Yeah, I cite to, 12:17:42

11 on page 5, under footnote 19, 12:18:04

12 discussion with Kurt Humphrey, SIS's 12:18:06

13 technical expert for that piece of 12:18:12

14 information. 12:18:14

15 So you had asked me earlier, 12:18:15

16 right, early in the dep what I remember 12:18:17

17 speaking with Mr. Humphrey about, and 12:18:24

18 that was one of the issues, obviously, 12:18:26

19 as well. 12:18:27

20 Q. So here, for this scenario 12:18:28

21 two, for the X and Xi EndoWrists, are 12:18:32

22 you take the January 1, 2021, date and 12:18:39

23 the January 1, 2022, dates as 12:18:43

24 assumptions? 12:18:45

25 A. Essentially, yes. It's not 12:18:50

1 R. BERO

2 unlike my scenario one, where, you 12:18:55
3 know, I'm not opining per se, that they 12:19:01
4 have the capability of doing it on 12:19:06
5 January 1st, 2020, or 2021 or 2022, 12:19:08
6 depending on whichever scenario you're 12:19:12
7 looking at. 12:19:17

8 I'm relying on the 12:19:21
9 capabilities and/or testimony or 12:19:23
10 discussion in this case with 12:19:26
11 Mr. Humphrey, in part, on those dates. 12:19:29
12 And of course, we don't have -- it 12:19:32
13 hasn't been done, so we don't have 12:19:36
14 specific known dates. These are 12:19:38
15 alternative possibilities that I 12:19:41
16 understand are reasonable under the 12:19:45
17 circumstances. 12:19:48

18 And for the record, I also 12:19:51
19 understand Intuitive's position is 12:19:52
20 probably that they're not reasonable. 12:19:54

21 Q. So what is your basis for 12:19:56
22 saying that you understand these 12:20:09
23 scenarios to be reasonable under the 12:20:11
24 circumstances? 12:20:13

25 A. What's my basis? 12:20:13

1 R. BERO

2 Q. Yes. 12:20:17

3 A. Well, I think specifically 12:20:18
4 I'm relying on the cites I got here in 12:20:26
5 footnote 418 under scenario two. But 12:20:31
6 more broadly, I understand that the 12:20:36
7 X/Xi came out, I believe it was in 12:20:44
8 2014, platform came out in 2014, or was 12:20:49
9 it 2017? I can't remember. But it had 12:20:53
10 been around, and there was a 12:20:55
11 recognition that the S and Si 12:20:57
12 EndoWrists were going to be likely 12:21:02
13 phased out over time, and that the X/Xi 12:21:06
14 was going to be -- EndoWrists were 12:21:11
15 going to be replacing, in part, those 12:21:19
16 S/Si EndoWrists, and that the volume 12:21:22
17 was going to be geared more towards the 12:21:24
18 X/Xi over time. And that's where the 12:21:27
19 repair services were going to be going. 12:21:32
20 And that SIS and Rebotix and Restore 12:21:35
21 recognized that, and were working on 12:21:43
22 that encryption as well. Up until 12:21:51
23 everything sort of came to a halt in, 12:21:59
24 you know, the winter of 2019, '20 time 12:22:04
25 frame. 12:22:09

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1 R. BERO

2 Q. So I think you said this 12:22:10
3 earlier, but just to confirm, you're 12:22:13
4 not offering an independent kind of 12:22:15
5 opinion in this case that the ability 12:22:18
6 to reset X/Xi EndoWrists by these third 12:22:20
7 parties necessarily would have been 12:22:26
8 available on January 21, 2021, correct? 12:22:27

9 A. Correct. 12:22:33

10 Q. And nor are you offering the 12:22:33
11 opinion that the services would have 12:22:35
12 been available as of January 1, 2022, 12:22:36
13 correct? 12:22:38

14 A. Correct. 12:22:39

15 Q. So you probably saw in 12:22:46
16 Mr. Smith's report that he recalculated 12:22:48
17 the damages in order to remove the X/Xi 12:22:51
18 volume from them. And my only question 12:22:54
19 is, if -- I understand you do not agree 12:22:56
20 with that, but did you have any issues 12:23:01
21 with the actual calculations that were 12:23:02
22 done with respect to that analysis? 12:23:04

23 MR. VAN HOVEN: Objection to 12:23:06
24 form. 12:23:06

25 A. I don't recollect, I don't 12:23:06

1 R. BERO

2 A F T E R N O O N S E S S I O N 13:01:21

3 (Time noted: 1:01 p.m.) 13:01:25

4 THE VIDEOGRAPHER: This marks 13:01:25

5 unit three. The time is 1:01 p.m. 13:01:27

6 Central time on March 8, 2023. 13:01:35

7 Back on the record. You may 13:01:35

8 proceed. 13:01:36

9 RICHARD F. BERO, RESUMED, 13:01:38

10 having been previously and duly 13:01:38

11 sworn, was examined and testified 13:01:38

12 further, as follows: 13:01:39

13 CONTINUED EXAMINATION 13:01:39

14 BY MS. BASS: 13:01:40

15 Q. Mr. Bero, when you were 13:01:40

16 preparing your report in this case, did 13:01:42

17 you speak to anyone at a GPO? 13:01:44

18 A. No. 13:01:47

19 Q. And you understand what I 13:01:47

20 mean when I say GPO, a group purchasing 13:01:49

21 organization, right? 13:01:52

22 A. Yeah, other than Jean Sargent 13:01:52

23 who, you know, used to work for a GPO, 13:01:56

24 other than that, no. 13:02:02

25 Q. So for example, you didn't 13:02:03

1 R. BERO

2 speak to anyone directly at Vizient, 13:02:04

3 correct? 13:02:06

4 A. Right, with the exception of, 13:02:07

5 as I referenced, Jean Sargent, correct. 13:02:11

6 Q. If you can look in your 13:02:13

7 opening report at page 50. 13:02:18

8 A. Yes. 13:02:35

9 Q. One second, I may be slightly 13:02:35

10 off on the page. 13:02:39

11 A. I'm sorry, I didn't catch the 13:02:48

12 beginning of that. 13:02:50

13 Q. I said, give me one second. 13:02:51

14 I think I have the wrong page. Okay? 13:02:54

15 A. Oh, okay. 13:02:57

16 Q. Apologies on that. It's on 13:03:36

17 page 44. 13:03:38

18 A. Okay. 13:03:48

19 Q. Okay. So you have a quote, 13:03:48

20 it actually carries over from 43, from 13:03:55

21 Mr. Keith Johnson. And then you say -- 13:03:58

22 A. Yes. 13:04:03

23 Q. -- over on 44 he says, He 13:04:03

24 also testified the potential revenue 13:04:07

25 from the S/Si EndoWrist business was 13:04:09

1 R. BERO
2 somewhere in the range of 250 million 13:04:12
3 to 350 million per year. 13:04:15
4 Do you see that sentence? 13:04:17
5 A. Yes. 13:04:21
6 Q. Okay. So my question for you 13:04:22
7 is, in this case, are you relying on 13:04:25
8 what Mr. Johnson said as a basis for 13:04:29
9 your opinions in this case? 13:04:33
10 A. In that specific quote, or 13:04:36
11 that specific range? 13:04:40
12 Q. Yeah, in that specific quote. 13:04:40
13 A. So let me just read the quote 13:04:43
14 so it's on the record. He, being 13:04:52
15 Mr. Johnson, also testified that the 13:04:59
16 potential revenue from the S/Si 13:05:01
17 EndoWrist business was somewhere in the 13:05:04
18 range of 250 million to 350 million per 13:05:05
19 year based on, and then it quotes his 13:05:09
20 testimony, "Conversations I had with 13:05:13
21 key customers to understand the number 13:05:16
22 of robotics they had, the number of 13:05:18
23 robots they had, the dollars spent on 13:05:21
24 devices and instrumentation for those 13:05:24
25 robots, and then looking at our global 13:05:26

1 R. BERO

2 customer list through Vizient and the 13:05:29

3 opportunities we would have." 13:05:32

4 So I'm not relying, per se, 13:05:41

5 on that quote, and that testimony. 13:05:46

6 It's consistent with conversations, 13:05:51

7 generally speaking, I had with 13:05:53

8 Mr. Johnson. As you can see in my 13:05:58

9 various damages claims, I'm not 13:06:12

10 quantifying a level approaching 250 13:06:14

11 million to 350 million per year. The 13:06:18

12 maximum I have is around 68 million. 13:06:25

13 So I guess my numbers aren't 13:06:33

14 inconsistent with Keith saying there's 13:06:35

15 potential for 250 to 350 million per 13:06:40

16 year. 13:06:44

17 Obviously, if you look at my 13:06:46

18 analysis, I make certain adjustments 13:06:49

19 down for various factors, and I guess 13:06:53

20 that's a long-winded answer of, I'm not 13:06:58

21 relying specifically on that statement, 13:07:01

22 but it's not inconsistent. It's 13:07:08

23 generally consistent with my 13:07:10

24 understanding and analyses. 13:07:12

25 Q. Well, based on what you have 13:07:13

1 R. BERO

2 here, he says that the S/Si EndoWrist 13:07:17
3 business was somewhere in the range of 13:07:22
4 250 million to 350 million. So 13:07:24
5 focusing on the fact that Mr. Johnson 13:07:26
6 was providing testimony about his view 13:07:28
7 of the S/Si opportunity, does that 13:07:32
8 change your answer? I just want to 13:07:36
9 make sure we're on the same page. 13:07:38

10 A. Well, at the time there was a 13:07:46
11 transition that's now become the X/Xi, 13:07:48
12 largely, as we've talked about. The 13:07:51
13 S/Si testimony that he gave was based 13:07:59
14 on the number of S/Si, S/Si robots that 13:08:01
15 he was aware of based on discussions 13:08:10
16 with one particular client in general, 13:08:12
17 and I believe they had all S/Si robots 13:08:15
18 at the time. 13:08:20

19 So I'm, you know, to the 13:08:22
20 extent he's limiting it just to S/Si, 13:08:25
21 obviously I'm not claiming anywhere 13:08:31
22 close to that in terms of my damages 13:08:34
23 calculations. I had a relatively small 13:08:38
24 amount of S/Si damages, relatively 13:08:41
25 speaking, in my calculation. 13:08:51

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1 R. BERO

2 Q. In your report, my 13:08:52
3 understanding is that you are assuming 13:09:11
4 that SIS would not need FDA approval to 13:09:14
5 reset the usage counter on EndoWrist 13:09:18
6 instruments. Am I right about that 13:09:22
7 assumption? 13:09:24

8 A. Are you -- that's correct. 13:09:24
9 Are you referring to a particular page? 13:09:27
10 I see you looking at something. 13:09:29

11 Q. No, I was not. 13:09:31

12 A. I have, I think that's one of 13:09:33
13 my assumptions listed up front in my 13:09:35
14 report. 13:09:38

15 Q. If you look at page 5 of your 13:09:46
16 opening report. 13:09:57

17 A. Yes, fourth bullet, that's my 13:09:58
18 assumption, correct. 13:10:01

19 Q. And you're simply taking that 13:10:01
20 assumption, I assume, from counsel; is 13:10:03
21 that right? 13:10:05

22 A. Well, I'm citing here 13:10:06
23 discussions with Mr. Johnson, 13:10:10
24 Mr. Posdal, as well as a deposition of 13:10:13
25 a gentleman from -- a deposition of a 13:10:19

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1 R. BERO

2 my recollection is, thought they could 13:36:16
3 get it up and running faster than what 13:36:18
4 we show here. But, you know, 13:36:20
5 ultimately, I'm relying on Jean Sargent 13:36:25
6 for that transition. 13:36:28

7 Q. You're not an expert on 13:36:29
8 conversion rates for medical devices at 13:36:33
9 hospitals, correct? 13:36:36

10 A. Correct. 13:36:38

11 Q. And you're not an expert on 13:36:39
12 conversion rates for medical devices at 13:36:41
13 GPOs, correct? 13:36:43

14 A. Correct. 13:36:44

15 Q. This information, do you 13:36:46
16 recall if it came through a discussion 13:36:52
17 with Ms. Sargent, or is it from her 13:36:54
18 expert report in the case? 13:36:58

19 A. I know we talked about this. 13:36:59
20 I believe she also has some information 13:37:07
21 in her expert report on this, but 13:37:10
22 certainly, I remember talking about the 13:37:15
23 motion, this concept, and these 13:37:20
24 percentages with her. 13:37:22

25 Q. Did Ms. Sargent provide you 13:37:30

1 R. BERO

2 with any documents to support the 13:37:32

3 conversion rates that she's included in 13:37:34

4 her expert report in this case? 13:37:38

5 A. I don't believe so, no. 13:37:43

6 Q. Did you undertake any effort 13:37:43

7 to verify the information that 13:37:45

8 Ms. Sargent was providing regarding the 13:37:49

9 conversion rates in the case? 13:37:53

10 A. I'm not -- this is, like, 13:37:59

11 your question earlier related to an 13:38:10

12 audit. And there are some things that 13:38:12

13 you can check against data that's 13:38:15

14 available. Accountants, CPAs, to the 13:38:19

15 extent that data is available, will 13:38:26

16 confirm, as you can see, throughout my 13:38:28

17 report. However, ultimately you're 13:38:30

18 relying on the expertise of others, and 13:38:34

19 I'm not aware of any documents, per se, 13:38:39

20 that would address this kind of an 13:38:44

21 issue. 13:38:48

22 And so ultimately, my opinion 13:38:52

23 is reliant upon this component that 13:38:58

24 transition happening over a two-year 13:39:05

25 period, basically, a 13:39:08

1 R. BERO

2 two-and-a-half-year period. Well, no, 13:39:09

3 two-year period. And that comes from 13:39:14

4 Ms. Sargent. 13:39:16

5 Q. Do you recall if SIS's 13:39:17

6 contract with Vizient was an exclusive 13:39:23

7 relationship? 13:39:26

8 A. I don't recollect that it was 13:39:26

9 exclusive. I may have addressed that 13:39:38

10 in my report, but I don't know that it 13:39:40

11 was exclusive, per se. 13:39:43

12 Q. If the conversion rates at 13:39:45

13 Vizient would have actually been lower 13:39:53

14 than what Ms. Sargent is offering, 13:39:56

15 would that mean that lost profits 13:39:59

16 damages would have been lower? 13:40:02

17 MR. VAN HOVEN: Objection to 13:40:04

18 form. 13:40:04

19 A. All else equal, yeah, they 13:40:04

20 would have spread out, or the 13:40:10

21 conversion rates would have been lower. 13:40:12

22 Yeah, that would, that would reduce the 13:40:14

23 lost profits numbers, correct. 13:40:19

24 Q. And similarly, on our prior 13:40:26

25 conversations about the expiration 13:40:27

1 R. BERO

2 price figures, at least as much as the 14:58:13
3 discounts shown in the memorandum of 14:58:18
4 understanding. 14:58:21

5 I didn't know that for my 14:58:23
6 first initial report, but once I 14:58:28
7 understood that those discounts would 14:58:33
8 have similarly applied to the 14:58:40
9 distributor prices, I incorporated 14:58:41
10 those into my analysis. 14:58:46

11 Q. So Mr. Gibson existed when 14:58:48
12 you filed, served your original report, 14:58:56
13 correct? 14:58:59

14 A. Did you ask if he existed? 14:59:01

15 Q. Yes. 14:59:06

16 A. He did. 14:59:06

17 Q. Yes. Any reason you couldn't 14:59:06
18 have spoken with him in conjunction 14:59:08
19 with your original report? 14:59:11

20 A. I don't know that there was a 14:59:12
21 reason other than, like anything, we're 14:59:17
22 trying to get this stuff done in as 14:59:23
23 quick a period of time with the 14:59:26
24 available information we have, and I 14:59:28
25 thought the basis that we had was 14:59:38

1 R. BERO

2 pretty reasonable. 14:59:40

3 And again, from the 14:59:40

4 plaintiff's perspective, I thought it 14:59:41

5 was quite conservative. 14:59:43

6 Q. And we talked about 14:59:51

7 Mr. Gibson's testimony earlier. It was 14:59:53

8 on your materials considered when you 14:59:54

9 did your opening report. And in that 14:59:56

10 testimony, he said he never would have 15:00:01

11 agreed to this memorandum of 15:00:03

12 understanding, but you think it's 15:00:04

13 reasonable now to rely upon the 15:00:05

14 conversation that you had with him two 15:00:08

15 years later regarding what he would 15:00:10

16 have done? 15:00:11

17 MR. VAN HOVEN: Objection to 15:00:13

18 form. 15:00:20

19 A. Absolutely, because he said 15:00:20

20 he wouldn't have agreed to the 15:00:22

21 memorandum of understanding, and I said 15:00:24

22 there were two primary reasons, and we 15:00:26

23 talked about one. That was the second, 15:00:26

24 lesser reason. 15:00:28

25 The primary reason he 15:00:30